

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN DOE,

Plaintiff,

v.

ORDER

Civil File No. 11-2561 (MJD/SER)

CEMSTONE PRODUCTS CO. and
CONCRETE PRODUCTS HEALTH
& WELFARE PLAN,

Defendants.

Thomas E. Glennon, Thomas E. Glennon, P.A., Counsel for Plaintiff.

George R. Wood, Littler Mendelson, PC, Counsel for Defendant Cemstone Products Co.

Molly R. Hamilton and Terrance J. Wagener, Messerli & Kramer P.A., Counsel for Defendant Concrete Products Health & Welfare Plan.

The above-entitled matter comes before the Court upon the Report and Recommendation of United States Magistrate Judge Steven E. Rau dated December 2, 2011. Plaintiff filed objections to the Report and Recommendation.

Pursuant to statute, the Court has conducted a de novo review upon the record. 28 U.S.C. § 636(b)(1); Local Rule 72.2(b). Based upon that review, the

Court **ADOPTS** the Report and Recommendation of United States Magistrate Judge Rau dated December 2, 2011. Based on the current Complaint, the Court must reject Doe's contention that he has pled in the alternative that the LTD policy is not an ERISA plan. All three counts of the Complaint explicitly reallege and incorporate Paragraph 4 of the Complaint, which alleges:

Defendant Concrete Products Health and Welfare Plan, a plan of insurance underwritten and administered by ReliaStar Life Insurance Company ("ReliaStar"), by and through the LTD Policy, at all relevant times, has been and is now a 'welfare benefit plan' under 29 U.S.C. § 1002(1) and an 'employee benefit plan' under 29 U.S.C. 1002(3).

(Compl. ¶¶ 6, 25, 30.) The Complaint provides no indication that Doe alternatively alleges that the LTD policy is not an ERISA plan. As the Complaint is currently pled, the state law claims cannot state a claim because they are explicitly based upon an ERISA plan.

Accordingly, based upon the files, records, and proceedings herein, **IT IS**

HEREBY ORDERED:

1. The Court **ADOPTS** the Report and Recommendation of United States Magistrate Judge Steven E. Rau dated December 2, 2011 [Docket No. 15].
2. Defendant Cemstone Products Company's Motion to Dismiss Counts I and II and in Part Count III of Plaintiff's Complaint

[Doc. No. 2] is **GRANTED** in part and **DENIED** in part as follows:

- a. To the extent that the motion seeks to dismiss Count I, the motion is **GRANTED**;
 - b. To the extent that the motion seeks to dismiss Count II, the motion is **GRANTED**;
 - c. To the extent that the motion seeks to dismiss Count III in part, the motion is **DENIED**.
3. Defendant Concrete Products Health and Welfare Plan's Motion to Dismiss Motion to Dismiss Count II and in Part Count III of Plaintiff's Complaint [Doc. No. 6] is **GRANTED** in part and **DENIED** in part as follows:
- a. To the extent that the motion seeks to dismiss Count II, the motion is **GRANTED**; and
 - b. To the extent that the motion seeks to dismiss Count III in part, the motion is **DENIED**.

Dated: January 8, 2012

s/ Michael J. Davis

Michael J. Davis

Chief Judge

United States District Court